84-1202

Office-Supreme Court, U.S.
FILED
JAN 26 1985
ALEXANDER L. STEVAS,
CLERK

NO. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

RIG HAMMERS, INC.,
Petitioner

v.

ODECO DRILLING, INC.,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE FIFTH CIRCUIT COURT OF APPEALS

L. KEITH SLADE
Counsel for Petitioner

Of Counsel:

WEITINGER, STEELHAMMER & TUCKER
8 Greenway Plaza
1200 Cashco Tower
Houston, Texas 77046
(713) 961-5800

Alpha Law Brief Co., Inc.—5606 Parkersburg—Houston, Texas 77036—223-3003

QUESTIONS PRESENTED

1. Whether a contractual provision requiring a stevedore-employer to *carry* policies of insurance naming a vessel owner as an additional insured is void under the Longshoremen's & Harbor Workers' Compensation Act, 33 U.S.C. § 905(b), and under *Bisso v. Inland Waterways Corp.*, 349 U.S. 85 (1955).

2. Whether requiring a stevedore-employer to pay a vessel owner the entire amount of its injured longshoreman's recovery against the vessel owner, for injuries caused by the vessel owner's own negligence, is prohibited by the Longshoremen's & Harbor Workers' Compensation Act, 33 U.S.C. § 905(b)?

INDEX

	Page
Questions Presented	1
Opinions Below	1
Jurisdiction	2
Statute Involved	2
Statement	3
Reasons for Granting This Writ	5
Conclusion	15
Appendix A:	
Opinion Below of the Fifth Circuit Court of Appeals	1a
Opinion Below of the District Court	11a
Judgment Below of the District Court	28a

TABLE OF AUTHORITIES

CASES	Page
Bisso v. Inland Waterways Corp., 349 U.S. 85 (1955)	4, 10, 11, 12, 13
Bloomer v. Liberty Mutual Insurance Co., 445 U.S. 81 (1980)	7, 8
Johnson v. American Mutual Liability Insurance Co., 559 F.2d 382 (5th Cir. 1977)	8, 9
Nations v. Morris, 483 F.2d 577 (5th Cir. 1973)	8
Price v. Zim Israel Navigation Co., Ltd., 616 F.2d 422 (9th Cir. 1980)	5, 6, 7, 9, 11, 13
Ryan Stevedoring Co. v. Pan Atlantic Steamship Corp., 350 U.S. 124 (1956)	5, 6, 8
Standard Oil Company of Texas v. Wampler, 218 F.2d 768 (5th Cir. 1955)	14
Twenty Grand Offshore, Inc. v. West India Carriers, Inc., 492 F.2d 679 (5th Cir.), *cert. denied* 419 U.S. 836 (1974)	11

CASES

Page

Voisin v. Odeco Drilling Co., 557 F.Supp. 715 (E.D. Tex. 1982) 3, 4, 10
Voisin v. Odeco Drilling Co., 744 F.2d 1174 (5th Cir. 1984) 9, 12

UNITED STATES STATUTES

33 U.S.C. § 905(b) (Longshoremen's & Harbor Workers' Compensation Act) 2, 3, 4, 5, 7, 8, 9, 13, 14

MISCELLANEOUS

H. R. Rep. No. 92-1441, 92nd Cong., 2d Sess. 7 ..... 5, 6, 7
Webster's Dictionary, New Collegiate Edition, 1975 9

NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

RIG HAMMERS, INC.,
Petitioner

v.

ODECO DRILLING, INC.,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE FIFTH CIRCUIT COURT OF APPEALS

To The Honorable, The Chief Justice And Associate Justices Of The Supreme Court Of The United States:

RIG HAMMERS, INC., the petitioner herein, prays that a writ of certiorari issue to review the judgment of the Fifth Circuit Court of Appeals entered in the above-entitled cause on October 29, 1984.

OPINIONS BELOW

The opinion of the Fifth Circuit Court of Appeals is reported at 744 F.2d 1174 (5th Cir. 1984), and is printed in Appendix A hereto, infra, page 1a. The opinion of

the United States District Court for the Eastern District of Texas, Beaumont Division, is reported at 557 F.Supp. 715 (E.D. Tex. 1982), and is printed in Appendix A hereto, infra, page 11a. The Journal Entry of Judgment of the United States District Court for the Eastern District of Texas, Beaumont Division, is printed in Appendix A hereto, infra, page 28a.

JURISDICTION

The opinion of the Fifth Circuit Court of Appeals (Appendix A, infra, page 1a), was rendered on October 29, 1984. The jurisdiction of the Court is invoked under the Longshoremen's and Harbor Workers' Compensation Act (L.H.W.C.A.), 33 U.S.C. § 905(b) (1976), and Rule 17 of the Supreme Court Rules.

STATUTE INVOLVED

Title 33, U.S.C. Section 905(b) states as follows:

> "In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no

such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter."

STATEMENT

Petitioner, Rig Hammers, entered a Master Service Contract with Respondent, Odeco, on October 26, 1976. *Voisin v. Odeco Drilling Co.*, 557 F.Supp. 715, Appendix A, infra, page 16a. Odeco's Master Service Contract required Rig Hammers to indemnify Odeco for all claims arising out of the work to be performed by Rig Hammers; to carry policies of insurance naming Odeco as an additional insured; to waive any claim against Odeco for damages to or destruction of Rig Hammers' property caused by Odeco; and to report to Odeco any accidents or injuries that occurred. *Voisin*, 557 F.Supp. 715, Appendix A, infra, page 17a. Not only did the Master Service Contract apply when Rig Hammers was performing work under contract with Odeco, but it also obligated Rig Hammers "with respect to any work performed by Contractor (Rig Hammers) pursuant to contracts or work orders with parties other than Company (Odeco) on any drilling barges, vessels, platforms, installations, or other property of any kind owned by, leased to, chartered to, or under the control of Company. . . ." *Voisin*, 557 F. Supp. 715, Appendix A, infra, page 17a. Rig Hammers' employee, Andrew Voisin, a "maritime employee" for purposes of the Longshoremen's & Harbor Workers' Com-

pensation Act, was injured while working on board Odeco's vessel, the D/B OCEAN PRIDE, on May 2, 1979. *Voisin,* 557 F.Supp. 715, Appendix A, infra, pages 11a, 15a, and 26a.

Voisin received worker's compensation benefits from Rig Hammers, and sued Odeco alleging that Odeco's negligence caused Voisin's injury. *Voisin,* 557 F.Supp. 715, Appendix A, infra, page 13a. Odeco then sued Rig Hammers for indemnity, as well as for damages for Rig Hammers' alleged breach of its contractual duty to carry policies of insurance naming Odeco as an additional insured. *Voisin,* 557 F.Supp. 715, Appendix A, infra. In a Memorandum Opinion on December 13, 1982, the United States District Court for the Eastern District for Texas, Beaumont Division, held that Voisin's injuries were proximately caused by Odeco's negligence, that under the Longshoremen's & Harbor Workers' Compensation Act, 33 U.S.C. Section 905(b), Odeco's claim for indemnity pursuant to Section 9 of the Master Service Contract was void, and that the additional insured provisions of the Master Service Contract were also proscribed.

Odeco appealed to the Fifth Circuit Court of Appeals, its sole issue presented being whether the provisions of the Master Service Contract requiring Rig Hammers to carry policies of insurance naming Odeco as an additional insured were void under 33 U.S.C. § 905(b). On October 29, 1984, the Fifth Circuit held that the "additional insured" requirements were not proscribed by the Longshoremen's & Harbor Workers' Compensation Act, reversing the District Court's holding on that point.

REASONS FOR GRANTING THIS WRIT

1. THE FIFTH CIRCUIT'S HOLDING BELOW IS A MISINTERPRETATION OF 33 U.S.C. § 905 (b) WHICH OPERATES TO CIRCUMVENT THE INTENT OF THE LONGSHOREMEN'S & HARBOR WORKERS' COMPENSATION ACT AND *BISSO v. INLAND WATERWAYS CORP.*, 349 U.S. 85 (1955).

Congress amended the Longshoremen's & Harbor Workers' Compensation Act (L.H.W.C.A.) in 1972 to provide that when the negligence of a vessel results in an injury to a longshoreman covered by the L.H.W.C.A., the longshoreman's employer shall not be liable to the vessel for such damages *directly or indirectly,* and any agreements or warranties to the contrary shall be void. 33 U.S.C. § 905(b) (1976) (emphasis added). Before the enactment of § 905(b), shipowners commonly sued longshoremen's employers for contribution and indemnity in "*Ryan* triangle" suits, named for *Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp.*, 350 U.S. 124 (1956), which allowed a shipowner to seek indemnification from a stevedore for damages paid to an injured longshoreman. *Price v. Zim Israel Navigation Co., Ltd.*, 616 F.2d 422 (9th Cir. 1980). Congress' purpose in prohibiting both direct and indirect liability of stevedores to vessels was to foreclose all theories under which *Ryan* triangle suits might be brought. *Price*, 616 F.2d at 428. The House Labor and Education Committee's stated intention in drafting § 905(b) was "to prohibit such recovery under any theory including, without limitation, theories based on contract or tort." *Price*, 616 F.2d at 428, citing H.R. Rep. No. 92-1441, 92nd Cong., 2d

Sess. 7, *reprinted in* (1972) U.S. Code Cong. & Admin. News pp. 4689, 4704.

In *Price*, the Ninth Circuit Court of Appeals stated as follows:

> Indeed, it seemed that Congress considered any recovery won by a vessel against a stevedore, even in a suit based on a theory of contract, to create a form of indirect liability, since such a recovery forced the stevedore indirectly to compensate the injured longshoreman despite 33 U.S.C. § 905(a) (1976) (codified prior to 1972 as 33 U.S.C. § 905) which limits the longshoreman's remedies to those provided in the statute. *Price* at 428.

In explaining the reason *Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp.*, 350 U.S. 124 (1956) was overruled, the House Report stated:

> The end result (under *Ryan*) is that despite the provision in the Act which limits an employer's liability to the compensation and medical benefits provided in the Act, a stevedore-employer is *indirectly liable* for damages to an injured longshoreman who utilizes the technique of suing the vessel under the unseaworthiness doctrine.

H.R. Rep. No. 92-1441, 92nd Cong., 2d Sess. 7, *reprinted in* (1972) U.S. Code Cong. & Admin. News at p. 4702 (emphasis added).

Price v. Zim Israel Navigation Co., Ltd., 616 F.2d 422 (9th Cir. 1980), was relied upon by the Fifth Circuit in its decision below. *Price* involved a suit by a vessel owner against an insurance carrier. In *Price*, Tokio Marine & Fire Insurance Co. (Tokio) had issued a policy of insur-

ance to ITS, a stevedoring company, in which vessel owner Zim Israel Navigation Co. (Zim) was named as an additional insured. Zim brought suit when Tokio refused to defend Zim in a suit brought by an injured ITS employee covered by the L.H.W.C.A., despite the fact that Tokio had previously defended Zim under the policy in a similar lawsuit. The Ninth Circuit held that ITS's contractual obligation to procure insurance naming Zim as an additional insured was not void so as to preclude Zim's action against Tokio for refusing to defend Zim, a named insured under the policy.

However, *Price* did not involve a suit by a vessel owner against a *stevedore-employer,* as does the case at bar. The Fifth Circuit's ruling below allowed a vessel owner to recover damages against a L.H.W.C.A. employer for a claim arising out of a vessel owner's own negligence. Section 905(b) was clearly intended to eliminate such third party litigation. *Price* at 429. The purpose of Congress' elimination of third party actions by shipowners against stevedores was to increase substantially the benefits to longshoremen under the Act; Congress was concerned that compensation benefits had been far too low. *Bloomer v. Liberty Mutual Insurance Co.,* 445 U.S. 81 (1980). As this Court pointed out in *Bloomer,* the House Report noted that the result of such third party litigation is

> "that much of the financial resources which could better be utilized to pay improved compensation benefits were now being spent to defray litigation costs." H. R. Rep. No. 92-1441, p. 9 (1972) U.S. Code Cong. & Admin. News, pp. 4698, 4702. Indeed, there was considerable testimony during the hearings that third party actions had resulted in congested courts and that the primary beneficiaries

> had been lawyers, not injured longshoremen. The Senate Report stated that "the social costs of these lawsuits, the delays, crowding of court calendars and the need to pay for lawyers' services have seldom resulted in a real increase in actual benefits for injured workers." *Id.* at 4. The elimination of the shipowner's cause of action against the stevedore was intended to reduce litigation, *immunize stevedores and their insurers from liability in third party actions,* and assure conservation of stevedore resources for compensation awards to longshoremen.
>
> *Bloomer,* 445 U.S. at 84-85 (emphasis added).

The judgment below is an impermissible extension of *Price* which would allow vessel owners to circumvent the clear intent of Congress. Therefore, the decision below should be overruled as inconsistent with the intent of § 905(b).

Rig Hammers would submit that the rule in *Nations v. Morris,* 483 F.2d 577 (5th Cir. 1973), is more consistent with Congress' intent than is *Price.* In *Nations,* the Fifth Circuit held that the exclusive provisions of the Longshoremen's and Harbor Workers' Compensation Act bar a direct action against an injured stevedore-employer's *insurer* as well as a suit against the employer, stating that in prohibiting indemnity claims by vessels against stevedores though nominally against insurers, Congress recognized that *Ryan* indemnities are paid by the employer-contractor. *Nations,* 483 F.2d at 589. Likewise, in *Johnson v. American Mutual Liability Insurance Co.,* 559 F.2d 382 (5th Cir. 1977), the Fifth Circuit stated that

> "while the Congress (in its 1972 amendments to the L.H.W.C.A.) did not specifically grant immunity

> to a compensation insurer from liability as a third person tort feasor, numerous provisions of the Act and the spirit of the Act as a whole, equating the insurer with the employer, *negate any intent to hold the insurer liable to suit for damages as a third person.*"
>
> *Johnson,* 559 F.2d at 388 (emphasis added).

Thus, *Price's* holding that § 905(b) does not bar a vessel's suit against an insurer under a policy issued to a stevedore-employer which names the vessel as an additional insured is contrary to congressional intent and should be overruled.

In addition, the case at hand involves a contractual obligation on the part of Rig Hammers to *carry* insurance naming Odeco as an additional insured, as opposed to *Price,* which involved a contractual requirement that ITS *procure,* not carry, insurance naming Zim as an additional insured. *Carry* is a broader term than *procure. Carry* means "to support and sustain the responsibility of," while *procure* means "to obtain or acquire." *Webster's Dictionary, New Collegiate Edition,* 1975. While the *Price* court pointed out that the purpose of the *procurement* provision may well have been "merely to allocate initially the burden of procuring insurance" (*Price* at 429), Rig Hammers respectfully submits that a logical interpretation of the word "*carry*" is that the premiums in question were to be paid by Rig Hammers. The "additional assured" provision is merely an attempt to guarantee that money will be available to fund the ever-present indemnity agreement. Rig Hammers' contractual obligation to indemnify Odeco is clearly void. *Voisin v. Odeco Drilling Co.,* 744 F.2d 1174, Appendix A,

infra, page 4a. Thus, we are faced with a situation in which Odeco is attempting to fund an illegal contractual provision. Odeco is attempting to do *indirectly* what it knows the law will not allow it to do directly—require the stevedore to pay for the damages caused by the negligence of Odeco. The fact that Odeco originally sought to require Rig Hammers to pay in small increments, in the form of premiums, makes no difference. In the final analysis, Rig Hammers is required to pay the same amount of money regardless of whether it is held liable under breach of contract or under the indemnity agreement. The end result is the same—the stevedore pays the damages caused by the vessel's negligence.

Furthermore, as stated below by the District Court:

> "The rational way of paying for injuries caused by the negligence of a vessel is to require the vessel, directly or through her own insurer, to bear the costs. The frequently negligent vessel is thereby forced to pay ever increasing insurance premiums, with the result that her expenses increase and her profits decline. Eventually, the errant vessel is either forced out of business, or forced into providing a safe workplace. This result comports with the intent of the House and Senate committees as expressed in the legislative history of the 1972 amendments to the Act." *Voisin*, 557 F.Supp. 715, Appendix A, infra, page 24a.

In *Bisso v. Inland Waterways Corp.*, 349 U.S. 85 (1955), this Court stated that the public policy reasons for invalidating contracts which release vessels from all liability for their negligence are: (1) to discourage negligence by making wrongdoers pay for the damage they

cause; and (2) to stop contractual overreaching by virtue of the vastly superior economic power of one party over another. The court below relied on *Price* and *Twenty Grand Offshore, Inc. v. West India Carriers, Inc.*, 492 F.2d 679 (5th Cir.), *cert. denied* 419 U.S. 836 (1974), in holding that *Bisso* does not operate to render Odeco's Master Service Contract invalid. However, in the case at bar, indications of disparity in bargaining power exist which were not present in either *Price* or in *Twenty Grand*. The circumstances of *Price* reveal equality of bargaining power and good faith negotiation between the vessel owner and the stevedore-employer as to their respective indemnity and insurance obligations, in that: (1) the vessel owner, Zim, agreed to indemnify the stevedore-employer, ITS, as to any claims resulting from Zim's negligence; and (2) Zim and ITS had eliminated the "additional insured" provision of the service contract because ITS's insurance premium would be substantially increased as a result of the coverage extended to Zim. *Price* at 425. Similarly, *Twenty Grand* involved an obligation on the part of each party to name the other as an "additional insured" under its insurance policy. *Twenty Grand*, 492 F.2d at 680. Further, no rights at all were waived by the original agreement between the parties; rather, subrogation rights were waived only by a later and independent agreement. *Twenty Grand* at 684. On the other hand, Odeco's Master Service Contract contains no such reciprocal insurance provision as was present in *Twenty Grand*. In addition, the indemnity provision in the case at bar, unlike the provision present in *Price*, required stevedore Rig Hammers to indemnify vessel owner Odeco for Odeco's own negligence whenever Rig Hammers was on board an Odeco vessel, regardless

of whether or not Rig Hammers was contributorily negligent and regardless of whether Rig Hammers was actually working for Odeco at the time. *Voisin v. Odeco Drilling,* 744 F.2d 1174, Appendix A, infra, pages 6a-8a.

Rig Hammers is dependent upon access to drilling vessels in order to ply its trade of hammering casing on offshore drilling wells. Finding itself in this position, as do all offshore drilling support industries, Rig Hammers must either agree to whatever the contractual provisions dictate or cease to do business. The Master Service Contract in question, as evidenced by its indemnity and "additional assured" provisions, is clearly the result of overreaching by Odeco. Rig Hammers was faced with two mutually onerous alternatives: (1) to contractually agree to (a) indemnify Odeco from the consequences of Odeco's own negligence; (b) *carry* various insurance policies with Odeco named as an individual insured; (c) waive all subrogation rights against Odeco; (d) name Odeco as an additional insured on all policies of insurance carried by Rig Hammers which were not required under the terms of the Master Service Contract, and (e) agree that all of the above provisions applied even if Rig Hammers was not working for Odeco at a given time; or (2) to cease doing business altogether. The court below erred in ruling that *Bisso* does not invalidate the "additional assured" provision of Odeco's Master Service Contract.

2. THE RULING OF THE COURT BELOW, THAT RIG HAMMERS MUST PAY THE ENTIRE AMOUNT OF ITS EMPLOYEE'S RECOVERY AGAINST ODECO FOR INJURIES CAUSED BY ODECO'S NEGLIGENCE, STANDS IN DIRECT OPPOSITION TO THE PUBLIC POLICY EFFECTUATED BY § 905(b), AND WILL OPERATE TO EMASULATE THE STATUTE.

Rig Hammers continues to assert that the Court below erred in holding that Rig Hammers' obligation under Odeco's Master Service Contract to carry policies of insurance naming Odeco as an additional insured are not void under § 905(b) and *Bisso*. However, in the alternative that the additional insured provisions are not held invalid Rig Hammers would assert that the Court below erred in ordering that Rig Hammers pay the entire amount of the injured employee's claim against Odeco.

The ruling below stands in direct opposition to the public policy effectuated by § 905(b). Congress clearly intended § 905(b) to prevent vessel owners from making stevedore-employers liable to the vessels, *directly or indirectly,* in tort or in contract, for damages resulting from injuries to employees of the stevedore-employers. *Price* at 428. In the case at bar, Odeco was sued by Rig Hammers' employee, and settled the case for $75,000.00. Odeco then proceeded to sue Rig Hammers under a breach of contract theory, to recover the $75,000.00 it had paid to Rig Hammers' employee. The opinion below has done nothing less than allow Odeco to obtain full indemnity from Rig Hammers *indirectly,* under a breach of contract theory, for damages resulting from Odeco's negligent injury of Rig Hammers' employee.

The results of the court's ruling below cannot be reconciled with the intent of § 905(b). If the decision is allowed to stand, a vessel owner may now guarantee that it will be indemnified by its stevedore-employer for the vessel's own negligence. A vessel owner now needs merely to require the stevedore-employer to carry insurance against the vessel owner's negligence. If the contractual duty to carry the vessel owner as an additional insured is performed by the stevedore-employer, the vessel owner has acquired protection against the consequences of its own negligence at the stevedore-employer's expense, obtaining its indemnity in small increments, in the form of insurance premiums. If the stevedore-employer's contractual duty is not performed, the vessel owner may sue the stevedore-employer under breach of contract and obtain full indemnity in this manner.

Rig Hammers would respectfully submit that the proper measure of damages for Rig Hammers' breach of its contractual requirement to carry Odeco as an additional insured, if such requirement is not void, would be the amount of the premium paid by Odeco for its own insurance. *Standard Oil Company of Texas v. Wampler,* 218 F.2d 768 (5th Cir. 1955).

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

L. KEITH SLADE
Counsel for Petitioner

Of Counsel:

WEITINGER, STEELHAMMER & TUCKER
8 Greenway Plaza
1200 Cashco Tower
Houston, Texas 77046
(713) 961-5800

APPENDIX A

ANDREW VOISIN, Plaintiff

v.

O.D.E.C.O. DRILLING CO.,
Defendant Third-Party Plaintiff-Appellant,

v.

RIG HAMMERS,
Third-Party Defendant-Appellee.

NO. 83-2257

United States Court of Appeals,
Fifth Circuit

October 29, 1984

Injured employee of stevedore commenced an action against, inter alia, vessel owner, and vessel owner filed a third-party action against stevedore alleging two causes of action based on stevedore's breach of a master service contract. Following settlement of employee's claim against vessel owner, the United States District Court for the Eastern District of Texas, Joe J. Fisher, J., 557 F.Supp. 715, denied recovery to vessel owner on its third-party action against stevedore, and vessel owner appealed. The Court of Appeals, Garza, Circuit Judge, held that: (1) Longshoremen's and Harbor Workers' Compensation Act did not void an agreement by stevedore to name vessel owner as an additional insured on stevedore's liability insurance policies, and (2) stevedore breached the agree-

ment by failing to add vessel owner as an additional assured.

Reversed and remanded.

Appeal from the United States District Court for the Eastern District of Texas.

Before GARZA, REAVLEY, and JOHNSON, Circuit Judges.

GARZA, Circuit Judge:

The question presented is whether section 905(b) of the Longshoremen's and Harbor Workers' Compensation Act (LHWCA) voids an agreement by a stevedore to name a vessel owner as an additional insured on its liability insurance policies. The court below found that such an agreement was void under the statute. Finding that neither the statute nor policy considerations support such a conclusion, we reverse.

Background

Andrew Voisin, an employee of Rig Hammers, Inc. (Rig Hammers), was injured while working aboard the OCEAN PRIDE, a drilling vessel positioned off the coast of Texas. The OCEAN PRIDE was owned and operated by Odeco Drilling Inc. (Odeco). At the time of his injury, Voisin was acting as supervisor of a Rig Hammers well casing crew on board the OCEAN PRIDE to drive conductor pipe in preparation for drilling operations. Voisin brought suit against Odeco and Rig Hammers alleging a cause of action under the Jones Act, a negligence action against Odeco, and an unseaworthiness action against the

vessel. Gray & Co., Inc., Rig Hammers' worker's compensation insurance carrier, intervened seeking reimbursement for the compensation benefits it had paid to Voisin. Odeco filed a third party action against Rig Hammers alleging two causes of action based on Rig Hammers' breach of the Master Service Contract between Odeco and Rig Hammers.

The Master Service Contract between Odeco and Rig Hammers required Rig Hammers to carry various kinds of insurance with stated minimum limits. Further, paragraph 8(f) of the contract provided in relevant part that:

> . . . [A]ll policies of [Rig Hammers] . . . shall name [Odeco] as an additional assured and shall be endorsed to waive Subrogation against [Odeco] and against all parties for whom [Odeco] may be working, with the exception of Workman's Compensation insurance but including all insurance carried by [Rig Hammers] protecting against loss of or damages to its property and equipment employed in the performance of any work order issued hereunder.

Rec. Vol. I, 30G. The contract also contained a broadly worded indemnity clause operating in favor of Odeco.[1]

---

1. The indemnity provision provided in pertinent part that "[I]t is . . . the intent of this paragraph to provide for indemnity to the maximum extent permitted by law and to support such indemnity by liability insurance coverage to be furnished by the indemnitor. * * * [Rig Hammers] agrees to indemnify and hold harmless Odeco from and against . . . any and all claims, demands, or actions for damages to persons and/or property (including, but not limited to claims, demands, or actions for bodily injury, illness, disease, death, loss of service, loss of society, maintenance, cure, wages, or property), which may be brought against [Odeco] (including, but not limited to such claims, demands, or actions brought by [Rig Hammers] employees and agents and the employees and agents of its subcontractors. . . ." Rec. Vol. 1, 30H.

The record reflects that Rig Hammers had an endorsement added to its comprehensive general liability and automobile liability policies. The endorsement stated, however, that the insurer " 'assum[ed] no greater liability . . . than would have been assumed by insuring the indemnity clause contained in the contract between Rig Hammers and Odeco. . . .' " *See* Third Party Defendant's Trial Brief at p. 6, Rec. Vol. I, 123. Odeco made timely but unavailing demands upon Rig Hammers and its insurer to secure its insurance rights under the Master Service Contract.

At the time of trial Odeco announced that it had settled with Voisin for $75,000 exclusive of the lien for worker's compensation benefits previously received by Voisin from Rig Hammers' worker's compensation carrier. Odeco's claim against Rig Hammers was tried to the court. After hearing evidence, the trial court found that Voisin was a maritime employee under the LHWCA. The court held that the indemnity and additional assured provisions of the Odeco Master Service Contract were void under the LHWCA, and therefore denied Odeco recovery against Rig Hammers. Additionally, the court held that Gray & Company was entitled to equitable subrogation against Odeco for the compensation benefits received by Voisin in the amount of $45,691. *See Voisin v. O.D.E.C.O. Drilling, Inc.*, 557 F.Supp. 715, 723 (E.D. TX, 1982).

Odeco brought this appeal. Odeco does not challenge the district court's ruling that the indemnity provision was void under section 905(b) of the LHWCA. At issue here is the district court's holding that the additional assured provision of the Odeco Master Service Contract was similarly void.

Discussion

[1] The LHWCA was enacted in 1927 to provide for certain maritime employees a compensation scheme similar to state worker's compensation systems. *Longmire v. Sea Drilling Corp.*, 610 F.2d 1342, 1349 (5th Cir. 1980) (footnote omitted). The statute affords benefits to the worker regardless of the employer's fault and provides that the employer's only liability for the injury is in the amount specified in the statute. *Edmonds v. Compagnie Generale Transatl.*, 443 U.S. 256, 261, 99 S.Ct. 2753, 61 L.Ed.2d 521 (1979); 33 U.S.C. § 905(a) (1976). An employer's liability is thus limited, but the worker is assured compensation in the event of injury.

The court below invalidated the indemnity and additional assured provisions of the Odeco Master Service Contract under section 905(b) of the LHWCA. *See Voisin*, 557 F.Supp. at 719-22. Section 905(b), which was part of the 1972 amendments to the LHWCA, provides in relevant part:

> In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person . . . may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. . . . The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall

> be exclusive of all other remedies against the vessel except remedies available under this chapter.

33 U.S.C. § 905(b) (1976).

[2] The district court ruled correctly that the indemnity clause of the Odeco Master Service Contract directly contravenes section 905(b). 557 F.Supp. at 720. Reasoning that the additional assured clause of the Master Service Contract was functionally equivalent to an indemnity clause, the court also invalidated the additional assured provision. *Id.* at 720-21. Additionally, the court found that policy considerations justified construing section 905(b) so as to proscribe such additional assured clauses. *Id.* at 722-23.

[3, 4] The legislative history of section 905(b) does not support the district court's construction of the statute or Rig Hammers' contention that the additional assured provision of the Master Service Contract results in a proscribed form of indirect liability. *See Price v. Zim Israel Navigation Co., Ltd.*, 616 F.2d 422, 428 (9th Cir. 1980). Prior to the enactment of section 905(b), a series of Supreme Court cases had eroded away the limited liability employers were granted under the LHWCA as originally written. We explained this development in *Longmire*, 610 F.2d 1342:

> First, the Supreme Court's decision in *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 66 S.Ct. 872, 90 L.Ed. 1099 (1946), permitted a longshoreman who was injured while performing work traditionally performed by seamen on a vessel owned by someone other than the injured longshoreman's employer to bring an action against the vessel based on the vessel's absolute, nondelegable duty to provide a seaworthy vessel, even if the 'unseaworthy' condition

> had been created by the longshoring crew. Ten years later, in *Ryan Stevedoring Co. v. Pan Atlantic Steamship Corp.*, 350 U.S. 124, 76 S.Ct. 232, 100 L.Ed. 133 (1956), the court held that a vessel liable under *Sieracki* circumstances could obtain indemnification from the longshoreman's employer (the stevedore), on the theory that the creation of the unseaworthy condition by the longshoring crew was a breach of the stevedore's implied warranty of workmanlike performance. Thus, after *Sieracki* and *Ryan* the stevedore's liability to his employees was no longer confined to the compensation obligation established in the LHWCA.

Id. at 1349. Under the indemnity triangle created by *Sieracki* and *Ryan*, the employer's statutory grant of limited liability " 'became but a hollow promise.' " *See id*, (citing *Smith v. M/V Captain Fred*, 546 F.2d 119, 1920 (5th Cir. 1977)). It was against this backdrop that Congress added section 905(b) to the LHWCA. Congress enacted section 905(b) "to eliminate the shipowner's liability to the longshoreman for unseaworthiness and the stevedore's liability to the shipowner for unworkmanlike service resulting in injury to the longshoreman—in other words, to overrule *Sieracki* and *Ryan*." *See Edmonds*, 443 U.S. at 262, 99 S.Ct. at 2757, 61 L.Ed.2d at 528; H.R. Rep. No. 1441, 92d Cong. 2d Sess., *reprinted in* 1972 U.S. Code Cong. & Ad. News 4698, 4702-05. Neither the statute nor its legislative history suggest that additional assured clauses such as the one before us are a proscribed form of indirect liability. We therefore agree with Odeco's contention that a valid additional assured clause[2] is not prohibited under section 905(b).

---

2. In regard to the general validity of the agreement, Rig Hammers suggests that the Master Service Contract is void for lack of

This conclusion is consistent with the Ninth Circuit's holding in *Price v. Zim Israel Navigation Co., Ltd.*, 616 F.2d 422 (9th Cir. 1980). In *Price*, Zim Israel Navigation Co. (Zim) entered into a contract with International Transportation Service (ITS), a stevedoring company. The contract required ITS to name Zim as a coinsured on its liability insurance policies. ITS directed its insurer, Tokio Marine & Fire Insurance Co. (Tokio), to add Zim as a coinsured on its comprehensive liability insurance policy. Price, a longshoreman employed by ITS, was injured while working aboard a Zim vessel.[3] Tokio refused to defend Price's suit against Zim. The Price suit ultimately settled, and Zim brought suit against Tokio. One of Tokio's arguments on appeal was that the coinsured clause violated section 905(b).

The Ninth Circuit rejected Tokio's argument that the coinsured provision of the contract violated section 905 (b). The court explained that "Congress' purpose in

---

consideration. *See* Brief for Appellee at 8. As the *Price* court noted, however, "[t]he economic burden of the premiums can be allocated as the parties wish." 616 F.2d at 429. The Master Service Contract was dated October 22, 1976, some two years prior to Voisin's injury. The record reflects that Odeco and Rig Hammers had an ongoing business relationship. *See* Odeco's Reply Brief, Rec. Vol. I, 140. On some occasions, Rig Hammers would be performing its services for Odeco; in other cases, Rig Hammers would be on board an Odeco vessel, but working under contract for a third party (in this case, Shell Oil Company). In either situation, the Master Service Contract was the operative agreement establishing the rights and liabilities of the parties. In all likelihood, the cost of Rig Hammers' services was effected by its contractual obligation to name Odeco as an additional assured on its liability insurance policies. Under these circumstances, we cannot accept Rig Hammers' contention that the agreement was not supported by sufficient consideration.

3. Although the ITS-Zim contract was modified to eliminate the coinsured provision prior to Price's injury, the coinsured endorsement was still in effect at the time of Price's injury. 616 F.2d at 427-28.

prohibiting both direct and indirect liability of stevedores to vessels was to foreclose all theories under which *Ryan* triangle suits might be brought rather than to prevent insurance arrangements" such as the one between ITS and Zim. 616 F.2d at 428. Rig Hammers contends that *Price* is distinguishable in that it involved an action against an insurer and because Tokio had on a previous occasion accepted the defense of a longshoreman's suit under the policy's coinsured endorsement (thus raising a possible estoppel issue). Despite these factual variances, we agree with the court's conclusion that an agreement as to which party should bear the burden of procuring insurance is not an illegal contract of indemnity under section 905(b).

The court below also invalidated the additional insured provision of the Odeco Master Service Contract based on the policy considerations enunciated by the Supreme Court in *Bisso v. Inland Waterways Corp.*, 349 U.S. 85, 75 S.Ct. 629, 99 L.Ed. 911 (1955). The district court reasoned that the additional assured clause was a means by which the vessel could "contract against her own fault." *See Voisin*, 557 F.Supp. at 723. In *Bisso* the Supreme Court invalidated a towage contract providing that "the towing movement should be at the 'sole risk'" of the barge being towed. 349 U.S. at 86, 75 S.Ct. at 630, 99 L.Ed. at 915. The Court stated that historically, the two main reasons for invalidating exculpatory clauses had been "(1) to discourage negligence by making wrongdoers pay damages, and (2) to protect those in need of goods or services from being overreached by others who have power to drive hard bargains." 349 U.S. at 91, 75 S.Ct. at 632-33, 99 L.Ed. at 918 (footnotes omitted). These reasons justified invalidating ex-

culpatory clauses in towing contracts given the nature of the industry and the vessel owner's need to operate "free of monopolistic compulsions." *Id.*

The district court's reliance on *Bisso* as support for its invalidation of the Odeco Master Service Contract is unsound because it is based on the erroneous assumption that an additional assured clause is by definition exculpatory. In *Twenty Grand Offshore, Inc. v. West India Carriers, Inc.*, 492 F.2d 679 (5th Cir.), *cert. denied*, 419 U.S. 836, 95 S.Ct. 63, 42 L.Ed.2d 63 (1974) (footnote omitted), we rejected the contention that "compulsory insurance clauses are exculpatory *per se* in the context of *Bisso*." *See id.* at 683. The purpose of insurance procurement provisions "may well be merely to allocate initially the burden of procuring insurance." *Price*, 616 F.2d 429. Moreover, there is no evidence indicating that the terms of the Master Service Contract were the product of oppressive or overreaching conduct on Odeco's part.

[5] In conclusion, we hold that Rig Hammers breached the Odeco Master Service Contract by failing to add Odeco as an additional assured in the unqualified manner directed by paragraph 8(f) of the contract. Consequently, Odeco was forced to pay money to Voisin and Gray & Company, Inc., that it would not have owed in the absence of Rig Hammers' breach. Additionally, Odeco was forced to incur legal fees as a result of Rig Hammers' breach of the Master Service Contract. The question of attorney's fees was never reached by the district court. On remand, the court should rule on the availability, if any, and the amount of attorney's fees to which Odeco claims it is entitled.

REVERSED and REMANDED.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

CIVIL ACTION NO. B-81-120-CA

ANDREW VOISON

v.

O.D.E.C.O. DRILLING, INC.

v.

RIG HAMMERS, INC.

(Filed December 13, 1982)

Richard C. Hile
Tonahill, Hile & Leister
Jasper, Texas
Attorney for Plaintiff

James Patrick Cooney
Royston, Rayzor, Vickery & Williams
Houston, Texas
Attorney for Defendant

L. Keith Slade
Weitinger, Steelhammer & Tucker
Houston, Texas
Attorney for Third-Party Defendant

MEMORANDUM OPINION

The plaintiff, Andrew Voison, was an employee of third-party defendant Rig Hammers. When injured, he was supervisor of a casing crew working aboard the OCEAN PRIDE, a jackup drilling rig, off the coast of Texas. The OCEAN PRIDE was owned by defendant

O.D.E.C.O. Drilling, Inc. (Odeco). Both Odeco and Voison's employer, Rig Hammers, were working for Shell Oil Co. under separate contracts. Odeco employees manned the rig; they served as its crew and also drilled the wells. The employees of Rig Hammers were onboard Odeco's vessel in order to drive conductor pipe so that drilling could begin.

Voison was injured while helping the crew of the OCEAN PRIDE. Voison had been asked by the Odeco driller to help him operate a wrapping drum winch (commonly called a cathead) on the rig's drawworks. They were using the winch to secure conductor pipe which the crew was stacking in the derrick.

The Odeco drilling crew and the Rig Hammers casing crew were working together in the preparatory welding of pipe into eighty foot sections before hammering began. Odeco's tool pusher had only one experienced roughneck available to assist in the stacking of the pipe—the other Odeco crewmen being "green," or inexperienced—so he gratefully accepted Voison's assistance. Voison was operating the cathead winch, which was being used to hoist the one experienced roughneck in the Odeco crew up into the derrick. The winch line supported the roughneck as he chained off the conductor pipe aloft.

The cathead is a quaint form of wrapping drum winch that rotates whenever the drawworks master clutch is engaged. The winch is actually a drum around which one wraps a large diameter (c. 1-1/2″) rope. By controlling the degree of friction between rope and drum, i.e., by either increasing or reducing the number of wraps around the drum or the hand-held tension on the rope,

a skilled operator can lift or lower relatively light loads via the catline.

Voison was hoisting the roughneck, who was already aloft in the derrick, when a kinked or unraveled section of rope was pulled onto the drum. The flaw in the rope caused it to jump out of the guide on the drum so that the rope began to wind over the adjacent turns instead of beside them. Voison had to act quickly lest the roughneck be hauled into the block above or forced to jump in order to save himself. When Voison tried to right the dangerous condition, his glove got caught between the turns of the rope. Voison was turned head over heels three or more times by the cathead with which he was entwined. The tool pusher finally disengaged the drawworks clutch, applied the inertia brake, and rescued Voison.

Voison received workman's compensation benefits from Rig Hammers. He sued Odeco alleging that its negligence caused his injury. Odeco then sued Rig Hammers as a third party defendant, seeking indemnity under the Odeco Master Service Contract. Odeco also sought recovery from Rig Hammers for the alleged breach of a contractual requirement that Rig Hammers name Odeco as an additional assured in Rig Hammers' insurance policies.

The evidence is undisputed; that the catline rope was flawed, that the tool pusher was not standing in a place where he could safely stop the drawworks at the onset of the accident, and that the drilling crew of the OCEAN PRIDE was undermanned and inexperienced. Voison argues that these conditions were the cause of his injury and that Odeco's vessel was negligent in allowing them to exist.

The court therefore finds as a fact that those conditions described above were the proximate cause of Voison's injury. Moreover, the court concludes that, in allowing these conditions to exist aboard the OCEAN PRIDE, Odeco negligently failed to provide a safe place to work.

On the day day of the trial, Voison and Odeco announced their settlement of Voison's negligence claim against Odeco for $75,000. This sum was exclusive of the compensation lien for the benefits that Rig Hammers had paid to Voison. The settling parties agreed that this was fair, reasonable, and adequate payment to Voison by Odeco for the injuries he suffered on the OCEAN PRIDE.

The court then heard testimony and received evidence on the issues of:

A. Voison's status as a seaman or maritime worker protected by the Longshoremen and Harborworkers Compensation Act, 33 U.S.C. § 901 *et seq.* (1976);

B. Rig Hammers' allegation that Voison was Odeco's borrowed servant;

C. Rig Hammers' indemnity obligation to Odeco pursuant to the Master Service Contract;

D. The obligation of Rig Hammers to provide insurance coverage for Odeco;

E. The reasonableness of the settlement amount and recovery upon the compensation lien.

A. SEAMAN OR MARITIME WORKER?

Odeco argued that Voison was a Jones Act seaman at the time of his injury on the basis of criteria set forth in *Offshore Company v. Robison,* 266 F.2d 769 (5th Cir. 1959). *Robison* indicated that an offshore oil worker might qualify as a seaman if he be permanently assigned to a vessel and his duties contribute to the functioning of the vessel.

As the OCEAN PRIDE was a drilling vessel and Voison's duties directly concerned the drilling operations on board, the latter condition is met. Arguably, the fact that Voison had worked on board a number of vessels operated on behalf of Shell Oil Co. imbued his relationship with the OCEAN PRIDE with sufficient "permanency" to satisfy the former condition. *See Roberts v. Williams-McWilliams Co., Inc.,* 648 F.2d 255 (5th Cir. 1981) (finding the permanency requirement met by assignment to a specific fleet of vessels).

Odeco argues that this simple inquiry suffices to determine an oil worker's status as a Jones Act seaman. Odeco's reliance on *Robison* however, is misplaced. The status of offshore oil workers has been more clearly defined since *Robison* was decided. Recent decisions have denied Jones Act seaman status to offshore oil workers, but have instead held them to be protected by other legislation.

It is now apparent that an oilfield specialty worker, injured while performing his duties on a drilling vessel, is a "maritime employee" for purposes of the Longshoremen and Harbor Workers' Compensation Act (hereinafter the Act), 33 U.S.C. §§ 901 *et seq.* (1976). *Boudreaux*

v. American Workover, Inc., 664 F.2d 463 (5th Cir. 1981) (rigger in a wireline crew injured onboard a drilling vessel in inland waters); Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331-1356, especially § 1331(b) (1976).

The court holds that Voison, as the supervisor of a well casing crew on board a drilling vessel, was an oilfield specialty worker covered by the Act at the time of his injury.

B. A BORROWED SERVANT?

The evidence showed that Voison was working alongside the other crewmen of the OCEAN PRIDE. He was operating equipment attached to the vessel and doing work that, had more experienced Odeco employees been available, might have been performed by OCEAN PRIDE crewmen. Rig Hammers urges the court to find that Voison was a borrowed servant, but that determination appears to be unjustified as well as unnecessary.

Calling Voison a borrowed servant of Odeco is unjustified because of the fact that both crews were working together to accomplish their respective goals. The crew of the OCEAN PRIDE was assisting the Rig Hammers' casing crew no less than the Rig Hammers' crew was assisting the OCEAN PRIDE's crew. Voison was no more the borrowed servant of Odeco than was the Odeco tool pusher the borrowed servant of Rig Hammers.

The court concludes that at the time of his injury aboard the OCEAN PRIDE Voison was not the borrowed servant of Odeco, but was rather in the employ and under the control of his employer, Rig Hammers.

C. VALIDITY OF THE INDEMNITY AGREEMENT

Rig Hammers entered an "Odeco Master Service Contract" October 26, 1976 which, Odeco asserts, was in force at the time Voison's injury occurred. That contract contains a number of boiler plate clauses for the protection of Odeco. On its face the agreement controls and governs all activities of Rig Hammers that might involve Odeco. That is, not only does the contract apply when Rig Hammers is performing work under contract with Odeco, but it also obligates Rig Hammers "with respect to any work performed by Contractor [Rig Hammers] pursuant to contracts or work orders with parties other than Company [Odeco] on any drilling barges, vessels, platforms, installations, or other property of any kind owned by, leased to, chartered to, or under the control of Company . . ." In particular, the above provision applies Sections 8, 9, 10 and 11 of the contract "with respect to work so performed."[1]

Rig Hammers was working on the OCEAN PRIDE pursuant to a contract with Shell Oil Co., not with Odeco. The vessel and her crew, however, belonged to Odeco. Those circumstances, Odeco claims, cause the Odeco Master Service Contract to control Rig Hammers' rights and obligations vis a vis Odeco in this case.

The court understands the usefulness of such open service contracts to the offshore drilling industry and the fact that they facilitate the provision of services under

---

1. Section 8 specifies insurance coverage to be carried by Rig Hammers; section 9 obliges Rig Hammers to indemnify Odeco of any claims; section 10 waives any claim against Odeco for damages or destruction to Rig Hammers' property that is caused by Odeco; and section 11 requires that Rig Hammers report any accidents or injuries that occur to Odeco.

work orders that incorporate by reference the blanket boiler plate of the master contracts. The wisdom is not clear however, of attempting to obligate a contractor in circumstances when no contractual relationship otherwise exists between the parties.

The court attributes this peculiarity to the relative bargaining strength of the parties and assumes that Rig Hammers so valued its work orders from Odeco and its access to Odeco's rigs that it was willing to agree to indemnify and insure Odeco per the Contract. Without deciding the interesting question of consideration in this Contract, the court assumes, *arguendo,* that the Contract was in force when the cathead threw Voison for a loop.

Odeco seeks to force Rig Hammers to indemnify it for the $75,000 damages, beyond the compensation lien amount that Odeco paid to Voison in settlement of Voison's negligence claim. Odeco also seeks to recover its attorney fees. Odeco relies on section 9 of the Odeco Master Service Contract which requires that Rig Hammers agree to indemnify and hold harmless Odeco from any and all claims arising from Rig Hammers' activities even though caused by the negligence of Odeco.[2]

---

2. Section 9 purports to be an allocation of the risks between the parties with their intent being "to provide for indemnity to the maximum extent permitted by law and to support such indemnity by liability insurance coverage to be furnished by the indemnitor." Section 9 further provides that Rig Hammers "agrees to indemnify and hold harmless Company [Odeco] from and against . . . any and all claims, demands, or actions for damages to persons and/or property . . . , which may be brought against Company . . . incident to, arising out of, in connection with, or resulting from the activities of Contractor [Rig Hammers] . . . whether occasioned, brought about, or caused in whole or in part by the negligence of Company, . . . or by unseaworthiness of any vessel . . . or by any defective condition of equipment of Company, regardless of whether such negligence, unseaworthiness, or defective condition be active or passive, primary or secondary.

Having found that Voison is a maritime worker entitled to protection under the Act, the court must necessarily afford to Voison's employer the protection of the Act. For the reasons discussed below, the court is convinced that section 9 of the Odeco Master Service Contract is in violation of the provisions of section 905 of the Act.

That section details the 1972 redefinition by Congress of the rights and duties between vessels, maritime workers, and their employers. Congress amended the Act in order to provide a fairer and more economically efficient system for paying the costs of the unfortunate but inevitable injuries incident to maritime employment.

The history of the 1972 amendments to the Act does not require discussion here. Other courts have explained the purpose and meaning of the amendments in sufficient detail. *See,* e.g., *Scindia Steam Navigation Co. Ltd., v. De Los Santos,* 451 U.S. 156 (1981); and *Pippen v. Shell Oil Co.,* 661 F.2d 378 (5th Cir. 1981). Congress wrote that redefinition in remarkably clear language.

Section 905(a) of the Act specifies that "the liability of an employer prescribed in section 4 [33 U.S.C. § 904] shall be exclusive and in place of all other liability of such employer to the employee, . . . [specified survivors], . . . , and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death . . ." 33 U.S.C. § 905(a) (1976).

Section 905(b) provides that "in the event of injury to a person covered under this Act caused by the negligence of a vessel, then such person . . . may bring an action against such vessel as a third party . . ." The Act further commands that "the employer shall not be liable to the vessel for such damages directly or indirectly and

any agreements to the contrary shall be void." 33 U.S.C. § 905(b) (1976).

The explicit provision was included in the Act, the court believes, to nullify just such clauses as the Odeco Master Service Contract imposes on Rig Hammers.

While this court has as solicitous a regard for the sanctity of contract between commercial entities as it does for the safety of maritime workers and seamen, it cannot disregard so direct a statement by Congress as section 905(b) of the Act.

The court concludes, therefore, that section 9 of the Odeco Master Service Contract is an agreement that directly makes Voison's employer liable to the vessel for the negligent acts of the vessel. Necessarily, the court holds that the Contract is in violation of section 905(b) of the Act and is void.

D. RIG HAMMERS' OBLIGATION TO INSURE ODECO

Section 8(f) of the Odeco Master Service Contract requires that all insurance policies of Rig Hammers, whether specifically required in the Contract or not, "shall name Company [Odeco] as an additional assured and shall be endorsed to waive subrogation against Company and against all parties for whom Company may be working with the exception of Workman's Compensation insurance . . ."

Inasmuch as Rig Hammers' insurance carrier did not respond to the Odeco demands for defense in this action, and as Rig Hammers had not at the time of the trial provided Odeco with copies of the policies required by the Odeco Master Service Contract, Odeco asserts a claim

for breach of contract. Accordingly, Odeco seeks to recover for the amount of its settlement with Voison (and presumably the compensation lien), as well as its attorneys' fees in this action.

Odeco claims that this "additional assured" provision stands independant from and is not qualified by any indemnity provision in the Odeco Master Service Contract. While this assertion may be true, its subtle implication—that the additional assured provision is not equivalent to an indemnity provision—requires refutation.

The court is of the opinion that Section 8(f) of the Odeco Master Service Contract is, no less than Section 9 discussed above, in violation of the plain requirements and prohibitions of section 905(b) of the Act. It is but another way of requiring that the employer of maritime workers indemnify the vessel for her negligent acts. As such, that clause of the Contract is void as a matter of law and its "breach" by Rig Hammers, if such there be, does not support a claim for damages.

In support of its argument to the contrary, Odeco relies on *Price v. Zim Israel Navigation Co., Ltd.*, 616 F.2d 422 (9th Cir. 1980). This opinion held that section 905 (b) of the Act did not make void an agreement between a stevedore firm and a vessel whereby the vessel was to be named as "co-insured" under the stevedore's insurance policies. In that case, the vessel sought to recover directly from the stevedore's insurer when the insurer failed to honor the "co-insurance" clause of the policies.[3]

---

3. That new versions of indemnification clauses appear a decade after the amendment of the Act gives proof to the expectation that vessels would use their relatively greater bargaining power to circumvent the Act. The House Report noted that "unless such hold-harmless, indemnity, or contribution agreements are prohibited as a matter of public policy, vessels by their superior economic strength

That court relied on the legislative history of section 905(b) of the Act in concluding that Congress did not intend to prohibit such co-insurance agreements. By narrowly reading the committee report cited above, the court concluded that section 905(b) was only intended to eliminate *Ryan*esque third-party litigation.[4]

The court stated that insurance procurement provisions do not make the maritime worker's employer directly or indirectly liable to the vessel, but simply allocate initially the burden of procuring insurance.

This court cannot agree with that conclusion. Not only do such co-insurance or additional assured provisions make the employer indirectly liable for damages caused by the negligence of the vessel, they work against the express public policy objective of encouraging safety by requiring the vessel to provide a safe workplace. In a situation such as exists here, the vessel has little incentive to provide a safe workplace because she has shifted the cost of failing to do so to the purse of another: the maritime workers' employer.

---

could circumvent and nullify the provisions of section 5 of the Act by requiring indemnification from a covered employer for employee injuries. H. R. Rep. No. 1441, 92d Cong., 2d Sess., *reprinted in* [1972] U.S. Code Cong. & Ad. News 4704.

4. The committee emphasized the fact that the amendment to the Act foreclosed the possibility that indemnification, contribution, or hold-harmless clause might be enforced:

> Accordingly, the bill expressly prohibits such recovery, whether based on an implied or express warranty. It is the committee's intention to prohibit such recovery under any theory including, without limitation, theories based on contract or tort. Under the proposed amendments, the vessel may not by contractual agreement or otherwise require the employer to indemnify it, in whole or in part, for such damages.

H. R. Rep. No. 1441, 92d Cong., 2d Sess., *reprinted in* [1972] U.S. Code Cong. & Ad. News 4704-05.

Should an employer choose to self-insure, the effect of the additional assured provision would be to contractually oblige the employer to bear the costs of the vessel's acts of negligence. An employee injured by the negligence of the vessel could sue the vessel, and recover damages; then the vessel could require the employer, as "insurer" of the vessel, to pay those damages on its behalf. In effect, the agreement would make the employer directly liable to the vessel for those damages.

The additional assured provision of the Odeco Master Service Contract accomplishes the same result *indirectly*. By purchasing liability insurance with a co-insurance clause, the employer of maritime workers pays for the damages caused by the negligence of a vessel in small increments. The premiums, less administrative costs, fill a "risk pool" of funds that eventually are paid out in satisfying claims against negligent vessels.

Regardless of whether the vessel or the employer pays the insurance premiums, the cost of the vessel's negligence is ultimately borne by the buyers of goods moved by sea. This proposition, however, ignores the more important point that the cost of harm ought to be borne by the party that causes the harm. Only by charging the damages at their source can due care be encouraged and negligence discouraged. The more that the costs of negligence are diffused in the economic system, the less is their value as an incentive to the exercise of due care.

The employer of maritime workers enjoys limited liability under the Act while his employees receive a "no fault" form of compensation when injured. Yet the employer has the incentive to avoid negligent behavior because his compensation insurance rates will increase as his claims increase. The better his employees' safety

record, the lower his insurance premiums are. If the employer runs an unsafe operation, his premiums increase with the result that he either increases his charges to vessels or reduces his profits by absorbing the costs himself. In either event, his ability to compete is reduced. Thus, the employer has a real economic incentive to exercise due care and keep his workers safe.

The court believes that section 905(b) of the Act imposes the same financial incentive upon a vessel by making the vessel liable for her acts of negligence which cause injury to maritime workers. Moreover, the utility of this incentive is diluted, although not destroyed entirely, when the vessel requires an employer of maritime workers to bear the cost of the vessel's negligent acts.

The effect of this "additional assured" clause is to put Voison's employer in an irrational and inequitable position: liable for the negligent acts of others as well as for its own.

The rational way of paying for injuries caused by the negligence of a vessel is to require the vessel, directly or through her own insurer, to bear the costs. The frequently negligent vessel is thereby forced to pay ever increasing insurance premiums with the result that her expenses increase and her profits decline. Eventually, the errant vessel is either forced out of business, or forced into providing a safe workplace. This result comports with the intent of the House and Senate committees as expressed in the legislative history of the 1972 amendments to the Act.

The conclusion of the *Zim* court that co-insurance provisions may serve merely to allocate intially the burden of procuring insurance is not justified on the facts of this

case. Despite the wording of section 9 of the Odeco Master Service Contract, the court does not believe that Odeco needs the help of occasional contractors such as Rig Hammers in procuring insurance coverage. Moreover, Odeco appears to have no discernible economic interest in obtaining liability coverage through its subcontractors instead of directly from an insurer.

The court finds that section 8(f), the "additional assured" subsection of the Odeco Master Service Contract, has the effect of making the injured maritime worker's employer liable to the vessel. This shifting of liability from the negligent vessel to the employer of the maritime workers, however cleverly done and under whatever rubric, is contrary to both the letter and the history of section 905(b) of the Act. The court therefore holds that contractual provision to be void and unenforceable against Rig Hammers.

The court's conclusion that the indemnity and the additional assured requirements of the Odeco Master Service Contract are void is consistent with the holdings of this circuit that section 905(b) of the Act prohibits indemnity actions by vessels against employers of maritime workers. *Pippen v. Shell Oil Co.*, 661 F.2d 378, 386 (5th Cir. 1981).

Moreover, this policy follows the long-standing reluctance of courts in maritime cases to enforce release-from-negligence-liability clauses in contracts. *The Steamer Syracuse*, 12 Wall. 167, 171 (1871) (notwithstanding a towing agreement, errant tug "must be visited with the consequences" of its own negligence); *The Wash Gray*, 277 U.S. 66, 73 (1928) (damage due to negligence of towing vessel will not be borne by tug despite terms of towage contract); *The Bisso*, 349 U.S. 85 (1956) (re-

iterating the judicial rule invalidating contracts releasing towers from all liability for their negligence).

As the Court noted in *Bisso,* application of the rule served (1) to discourage negligence by making wrongdoers pay for damages, and (2) to protect those in need of goods or services from being overreached by others who have the power to drive hard bargains. *Id.* at 91.

Those same reasons apply in the instant case, and although Odeco did not provide needed goods or services to Rig Hammers, the situation is otherwise analogous. Just as the tug is dependent upon the availability of the towing vessel, Rig Hammers is dependent upon access to drilling vessels in order to ply its trade of hammering casing on offshore oil wells.

"It ought to be against public policy to permit a vessel to contract against her own fault. To allow her to do so begets recklessness, carelessness, and neglect." *The Oceania,* 170 F. 893, 896 (2d Cir. 1909) (Coxe, J., dissenting). The court believes: that it not only *ought* to be against public policy, but that it *is* against public policy, as expressed in section 905(b) of the Act and its legislative history, for a vessel to contract against her own fault as was here attempted.

E. THE SETTLEMENT AND THE COMPENSATION LIEN

Odeco agreed by the terms of its compromise with Voison to pay him Voison $75,000, exclusive of Rig Hammers' compensation lien, as damages for the injury he suffered due to the negligent acts of Odeco's vessel OCEAN PRIDE. As subrogatee of Voison's employer, Rig Hammers, the intervenor, Gray & Co., asserts its

equitable lien against the proceeds recovered by Voison for compensation benefits paid to Voison by Gray on behalf of Rig Hammers. The benefits paid to Voison between the date of his injury and his return to work total $45,691.00.

Implicit in Odeco's agreement to pay Voison $75,000 *exclusive* of the compensation lien is the obligation to pay off the compensation lien itself. In other words, Odeco is liable for a total amount of $120,691.00 for its negligence in causing the injury of Voison onboard the OCEAN PRIDE.

Since Voison agreed to the amount of damages, the court concludes that $75,000 is an adequate and fair award to Voison above and beyond his employer's compensation lien for injuries he sustained May 2, 1979 aboard the OCEAN PRIDE.

Having noted the settlement between the parties, the court enters judgment for the Plaintiff, Andrew Voison, in the amount of $75,000 against O.D.E.C.O. Drilling, Inc.

Judgment is entered for third party defendant Rig Hammers, Inc. and intervenor Gray & Co. against O.D.E.C.O. Drilling, Inc. in the amount of $45,691.00.

O.D.E.C.O. Drilling, Inc. is neither entitled to indemnity from Rig Hammers, Inc. nor entitled to status as an additional assured under the insurance policies of Rig Hammers, Inc.

SIGNED and ENTERED this the 10th day of DECEMBER, 1982.

/s/ JOE J. FISHER
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

CIVIL ACTION NO. B-81-120-CA

ANDREW VOISON

v.

O.D.E.C.O. DRILLING, INC.

v.

RIG HAMMERS, INC.

FINAL JUDGMENT

IN ACCORDANCE WITH the Memorandum Opinion in the above-styled and numbered cause entered this day, the Court hereby orders that Judgment be entered for the Plaintiff, ANDREW VOISON, against Defendant, O.D.E.C.O. DRILLING, INC., in the amount of $75,000.00. The Court further orders that judgment be entered for the Third-Party Defendant, RIG HAMMERS, INC., against O.D.E.C.O. DRILLING, INC. in the amount of $45,691.00, with costs taxed against the Defendant.

SIGNED and ENTERED this the 10th day of DECEMBER, 1982.

/s/ JOE J. FISHER
United States District Judge

Office-Supreme Court, U.S.
FILED
FEB 27 1985
ALEXANDER L. STEVAS,
CLERK

NO. 84-1202 (2)

IN THE

Supreme Court of the United States

OCTOBER TERM 1984

RIG HAMMERS, INC.,
Petitioner

v.

ODECO DRILLING, INC.,
Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JAMES PATRICK COONEY
Attorney for Respondent

Of Counsel:

ROYSTON, RAYZOR, VICKERY & WILLIAMS
2200 Texas Commerce Tower
Houston, Texas 77002
713/224-8380

Alpha Law Brief Co., Inc.—5606 Parkersburg—Houston, Texas 77036—223-3003

BEST AVAILABLE COPY

20pp

SUBJECT INDEX

	Page
STATEMENT OF THE CASE	1
A. Course of Proceedings and Disposition in the Courts Below	2
B. Statement of Facts	5
ARGUMENT	6
A. There Is No Conflict With The Decisions Of This Court.	7
B. The Decision Of The Fifth Circuit Is Not Contrary To Decisions Rendered By Other Circuit Courts.	13
CONCLUSION	15
CERTIFICATE OF SERVICE	17

LIST OF AUTHORITIES

CASES

	Page
Aparicio v. Swan Lake, 643 F.2d 1109 (5th Cir. 1983)	9
BASF Wyandotte Corp. v. Tug Leander, Jr., 590 F.2d 96 (5th Cir. 1979)	12
Bisso v. Inland Waterways Corporation, 349 U.S. 85 (1955)	6, 10, 11, 12, 15
Bloomer v. Liberty Mutual Ins. Co., 445 U.S. 81 (1980)	13
Dillingham Tug & Barge Corp. v. Collier Carbon & Chemical Corp., 707 F.2d 1086 (9th Cir. 1983)	12
Dixilyn Drilling Corp. v. Crescent Towing & Salvage Co., 372 U.S. 697 (1963)	10
Edmonds v. Compagnie Generale Transatl., 443 U.S. 256 (1979)	6
Fluor Western, Inc. v. G & H Offshore Towing Co., 447 F.2d 35 (5th Cir.), *cert. denied*, 405 U.S. 922 (1972)	12
Hartford Fire Ins. Co. v. Port Everglades Towing Co., Ltd., 454 F.2d 276 (5th Cir. 1972)	12
Hercules, Inc. v. Stevens Shipping Co., Inc., 698 F.2d 726 (5th Cir. 1983)	12
Italia Societa v. Oregon Stevedoring Co., 376 U.S. 315 (1964)	8

CASES

	Page
Johnson v. American Mutual Liability Ins. Co., 559 F.2d 382 (5th Cir. 1977)	14
Nation v. Morris, 483 F.2d 577 (5th Cir. 1973)	14
Ogea v. Loffland Bros. Co., 622 F.2d 186 (5th Cir. 1980)	15
Pippen v. Shell Oil Co., 661 F.2d 378 (5th Cir. 1981)	9
Price v. Zim Israel Navigation Co., Ltd., 616 F.2d 422 (9th Cir. 1980)	7, 9, 13, 14, 15
Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., 350 U.S. 124 (1956)	8, 9
Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946)	8, 9
Scindia Steam Navigation Co. v. De Los Santos, 451 U.S. 156 (1981)	6, 8, 9
Stewart v. Cran-Vela Rental Co., 510 F.2d 982 (5th Cir. 1975)	15
Twenty Grand Offshore, Inc. v. West India Carriers, Inc., 492 F.2d 679 (5th Cir.), *cert. denied*, 419 U.S. 836 (1974)	11, 12
Voisin v. O.D.E.C.O. Drilling Co., 744 F.2d 1174 (5th Cir. 1984)	2, 11, 12, 13, 15
Voisin v. O.D.E.C.O. Drilling Inc., 557 F.Supp. 715 (E.D. Tex. 1982)	2

UNITED STATES STATUTES

33 U.S.C. § 905(b) [Longshoremen's & Harbor Workers' Compensation Act]	2, 6, 7, 9, 10, 13, 14, 16
46 U.S.C. § 688 *et seq.* [Jones Act]	3

MISCELLANEOUS

H. R. Rep. No. 92-1441, 92nd Cong., 2d Sess. 7, *reprinted in* [1972] U.S. Code Cong. & Admin. News pp. 4698-4704	9

NO. 84-1202

IN THE

Supreme Court of the United States

OCTOBER TERM 1984

RIG HAMMERS, INC.,
Petitioner

v.

ODECO DRILLING, INC.,
Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To The Honorable Justices Of The Supreme Court Of The United States:

COMES NOW Odeco Drilling, Inc., the Respondent herein, and files this its Brief in Opposition to the Petition for Writ of Certiorari filed herein, and would show as follows:

STATEMENT OF THE CASE

Rig Hammers, Inc., the Petitioner herein, seeks review of a judgment the United States Court of Appeals for the

Fifth Circuit rendered on October 29, 1984, reversing the judgment of the United States District Court for the Eastern District of Texas in favor of Rig Hammers and remanding the cause for further proceedings consistent with the appellate opinion. The opinion of the Fifth Circuit is published under the style of *Voisin v. O.D.E.C.O. Drilling Co.*, 744 F.2d 1174 (5th Cir. 1984).[1] The memorandum opinion of the District Court is published under the style of *Voisin v. O.D.E.C.O. Drilling, Inc.*, 557 F.Supp. 715 (E.D. Tex. 1982).[2]

The central issue presented for review is whether the Petitioner's contractual obligation to procure liability insurance naming the Respondent as an additional assured was void under Section 905(b) of the Longshoremen's & Harbor Workers' Compensation Act, 33 U.S.C. § 905 (b). The Fifth Circuit Court of Appeals held that the contractual obligation was enforceable by the Respondent and was not prohibited by Section 905(b). The Petitioner also seeks review of a related issue concerning the damages that the Respondent is entitled to recover from the Petitioner by virtue of the latter's breach of contract.

A. Course of Proceedings and Disposition in the Courts Below

Andrew Voisin, an employee of Rig Hammers, Inc., instituted a cause of action against Odeco Drilling, Inc., the Respondent herein, and the vessel D/B OCEAN PRIDE on February 25, 1981, invoking the jurisdiction of the District Court pursuant to diversity of citizenship,

1. The Fifth Circuit's opinion is reprinted in Petitioner's Petition for Writ of Certiorari, Appendix A at pp. 1a-10a.

2. The District Court's memorandum opinion is reprinted in Petitioner's Petition for Writ of Certiorari, Appendix A at pp. 11a-27a.

and alleging entitlement to recover damages for personal injuries sustained in the course of his employment onboard the OCEAN PRIDE. Odeco answered and filed a Third-Party Complaint against Rig Hammers asserting two causes of action arising out of Rig Hammers' breach of a Master Service Contract between Odeco and Rig Hammers.

In February, 1982, Voisin filed an Amended Complaint, alleging a cause of action against Odeco and Rig Hammers pursuant to the Jones Act, 46 U.S.C. § 688 *et seq.* Odeco filed an Amended Answer and asserted a Cross-Claim against Rig Hammers arising from Rig Hammers' breach of the Master Service Contract.

The case came on for trial on March 29, 1982, at which time it was announced that the Plaintiff and Odeco had reached a settlement agreement wherein the Plaintiff would receive $75,000.00 exclusive of the lien for workers' compensation benefits previously paid to the Plaintiff. The District Court found the settlement to be fair and reasonable.

The Court then proceeded to trial on Odeco's Third-Party Complaint against Rig Hammers. On December 13, 1982, the District Court entered its Memorandum Opinion and Final Judgment. The District Court found that Voisin was a maritime employee within the meaning of the Longshoremen's & Harbor Workers' Compensation Act, and hence not a seaman under the Jones Act or the general maritime law. On the basis of this finding, the Court held that Odeco's claim for indemnity pursuant to Section 9 of the Master Service Contract was void under Section 905(b) of the Act. The District Court further held that the additional assured provisions con-

tained in Section 8(f) of the Master Service Contract fell within the proscriptive effect of Section 905(b), and therefore denied Odeco recovery against Rig Hammers.

After finding that the Intervenor, Gray & Co., Inc., was entitled to equitable subrogation against Odeco for compensation benefits paid to Voisin in the amount of $45,691.00, the District Court entered judgment for the Plaintiff against Odeco in the amount of $75,000.00, and judgment for Rig Hammers and Gray & Co., Inc. against Odeco Drilling, Inc. in the amount of $45,691.00. On February 16, 1983, the District Court denied Odeco's Motion to Amend Findings of Fact and Alter or Amend the Judgment. Notice of Appeal was filed by Odeco on February 28, 1983.

The sole issue presented on appeal was whether the District Court erred in holding that Rig Hammer's contractual obligation contained in the Master Service Contract between Odeco and Rig Hammers to procure insurance naming Odeco as an additional assured was void under Section 905(b). The Fifth Circuit entertained oral argument, and thereafter, on October 29, 1984, rendered its opinion. The Fifth Circuit held that Section 905(b) did not void the provision of the Master Service Contract requiring Rig Hammers to name Odeco as an additional assured in all of Rig Hammers' insurance policies, and that Rig Hammers had breached the Master Service Contract by failing to name Odeco as an additional assured.

The Court of Appeals reversed the decision of the District Court and remanded the cause for further proceedings consistent with the appellate opinion. Rig Hammers, Inc., the Petitioner herein, filed its Petition for Writ of Certiorari in the United States Supreme Court on January 26, 1985.

B. Statement of Facts

Andrew Voisin, an employee of Rig Hammers, was injured on or about May 2, 1979, while working onboard the D/B OCEAN PRIDE, a jack-up drilling rig owned by Odeco. Both Odeco and Rig Hammers were working under contract to Shell Oil Company, the operator of the well to be drilled. Voisin was employed by Rig Hammers as a supervisor of a casing crew which had been dispatched to the vessel to drive conductor pipe in preparation for drilling operations, and was injured while assisting the crew of the OCEAN PRIDE by operating a wrapping drum on the rig's drawworks in conjunction with an effort to stack conductor pipe in the rig's derrick.

A Master Service Contract dated October 22, 1976, was in force and effect between Odeco and Rig Hammers on the date of Voisin's injury. Section 8(f) of the Master Service Contract provided in relevant part:

> All policies of the Contractor [Rig Hammers], . . . shall name Company [Odeco] as an additional assured and shall be endorsed to waive Subrogation against Company [Odeco] and against all parties for whom Company may be working, with the exception of Workman's Compensation insurance. . . .

Under the provisions of this Section, Rig Hammers was obligated to have Odeco named without qualifications as an additional assured in all of Rig Hammers' insurance policies. Rig Hammers failed to satisfy this obligation. Odeco made appropriate and timely demands upon both Rig Hammers and Rig Hammers' insurance broker, Gray & Co., Inc., in an attempt to secure its insurance rights under the Master Service Contract. These demands were refused by Rig Hammers and Gray & Co., Inc.

ARGUMENT

The Petitioner urges that a writ of certiorari should be granted in this cause for two reasons. First, the Petitioner contends that the holding of the court of appeals is inconsistent with congressional intent underlying Section 905(b) of the Longshoremen's & Harbor Workers' Compensation Act, and inconsistent with this Court's prior decision in *Bisso v. Inland Waterways Corporation.*[3] Second, the Petitioner argues alternatively that the decision of the Fifth Circuit, which would require the Petitioner to respond in damages to Respondent for breach of contract, would be repugnant to the proscription of employer liability set forth in Section 905(b) of the Act.

The Respondent submits that the Fifth Circuit's ruling below was correct and that Petitioner's arguments do not reflect considerations that would support a discretionary review of this case by the Court on writ of certiorari. First, the decision of the Fifth Circuit is not in conflict with the decisions of this Court. The Fifth Circuit correctly held that the 1972 Amendments to the Act do not prohibit agreements between an employer and vessel owner respecting the procurement of insurance. While this Court has not had an occasion to consider the precise issue, the Fifth Circuit's construction of Section 905(b) and its legislative history is not in conflict with the relevant decisions of this Court.[4] Further, the holding of the Fifth Circuit below is not in conflict with this Court's decision in *Bisso v. Inland Waterways Corporation,* to the extent that the *Bisso* decision is applicable to the case at bar.

---

3. 349 U.S. 85 (1955).

4. *See, e.g.,* Scindia Steam Navigation Co. v. De Los Santos, 451 U.S. 156 (1981); Edmonds v. Compagnie Generale Transatl., 443 U.S. 256 (1979).

Second, the decision of the Fifth Circuit is not contrary to decisions rendered by other circuit courts. To the contrary, the Fifth Circuit's decision in the case at bar is fully supported by and consistent with the decision of the Ninth Circuit Court of Appeals in *Price v. Zim Israel Navigation Co., Ltd.*,[5] where the Ninth Circuit upheld the validity of an additional assured provision in a contract between a vessel owner and a stevedore in the face of an argument that the provision was nullified by the statutory proscription of employer liability in Section 905(b). The Petitioner's attempts to factually distinguish *Price* from this case and thus create an apparent "conflict" between the circuits are not persuasive.

A. There Is No Conflict With The Decisions Of This Court.

The Fifth Circuit Court of Appeals, after careful consideration of the 1972 Amendments to the Longshoremen's & Harbor Workers' Compensation Act and the legislative history thereto, held that Section 905(b) of the Act[6] does not prohibit an agreement between an employer and vessel owner respecting the procurement of

---

5. 616 F.2d 422 (9th Cir. 1980).

6. 33 U.S.C. § 905(b). The section provides:

> (b) In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third-party in accordance with provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. . . . The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time of the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

insurance. While this Court has not had an occasion to consider this precise issue, it is clear that the Fifth Circuit decision is not in conflict with the decisions of this Court which have considered the effect of the 1972 Amendments to the Act.[7]

This Court's discussion and treatment of the 1972 Amendments in *Scindia Steam Navigation Co. v. De Los Santos*[8] is illustrative. Prior to the 1972 Amendments, an injured worker covered under the Act could receive compensation payments from his employer and also might obtain a judgment against the vessel owner if the injury was caused by the vessel's unseaworthiness or negligence. *Seas Shipping Co. v. Sieracki.*[9] Proof of unseaworthiness required no proof of fault on the part of the vessel other than the unsafe, injury-causing shipboard condition. This was true even if the condition was caused, created, or brought into play by the injured worker's employer or his co-workers.[10] In such event, however, the vessel owner could recover over and against the employer for a breach of an express or implied warranty of workmanlike performance. *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*[11]

The 1972 Amendments, particularly by adding Section 905(b), radically changed this scheme of things. The injured worker's right to recover for unseaworthiness was

---

7. Refer to Note 4 *supra*.

8. 451 U.S. 156, 164-65 (1981).

9. 328 U.S. 85 (1946).

10. Scindia Steam Navigation Co. v. De Los Santos, 451 U.S. at 164 & n.11. *See, e.g.*, Italia Societa v. Oregon Stevedoring Co., 376 U.S. 315 (1964).

11. 350 U.S. 124 (1956).

abolished. A right of recovery from the vessel for negligence was preserved in Section 905(b); however, it was provided that the employer should not be liable to the vessel for such damages directly or indirectly and that any agreements or warranties to the contrary would be void.[12]

An examination of the legislative history of the 1972 Amendments reflects that Congress' purpose in prohibiting both the direct and indirect liability of an employer under Section 905(b) was to foreclose all theories under which *Sieracki-Ryan* triangle suits might be brought[13] rather than to preclude insurance arrangements such as those contained in Section 8(f) of the Master Service Contract at issue.[14] The abolition of the employer's direct or indirect liability to the vessel under Section 905(b) was enacted as a *quid pro quo* for the elimination of the warranty of seaworthiness owed by the vessel to *Sieracki*-seamen,[15] and was clearly perceived by Congress as necessary to abolish the judicially created *Sieracki-Ryan* triangle that had effectively nullified the exclusive liability provision of former Section 905 of the Act with respect to employers.[16]

---

12. Scindia Steam Navigation Co. v. De Los Santos, 451 U.S. at 164.

13. H. R. Rep. No. 92-1441, 92nd Cong., 2d Sess. 7, *reprinted in* [1972] U.S. Code Cong. & Admin. News pp. 4698-4704. *See, e.g.,* Pippen v. Shell Oil Co., 661 F.2d 378, 386-87 & n.15 (5th Cir. 1981); Aparicio v. Swan Lake, 643 F.2d 1109, 1115-16 (5th Cir. 1983); Price v. Zim Israel Navigation Co., Ltd., 616 F.2d 422, 428 (9th Cir. 1980).

14. Price v. Zim Israel Navigation Co., Ltd., 616 F.2d at 428.

15. Pippen v. Shell Oil Co., 661 F.2d at 387 n.15.

16. H.R. Rep. No. 92-1441, *supra,* Note 13, *reprinted in* [1972] U.S. Code Cong. & Admin. News at p. 4702.

Thus, Congress enacted Section 905(b) to prohibit a vessel from seeking indemnity from the employer by agreement or otherwise. The statute, however, manifests no intention on the part of Congress to expand the proscriptive effect of Section 905(b) beyond an indemnity construct, and there is nothing in the 1972 Amendments nor in their legislative history evidencing a congressional intent to invalidate contractual agreements between an employer and vessel allocating the burden of procuring insurance. Nor have the relevant decisions of this Court ever intimated that the 1972 Amendments to the Act should be so construed.

Similarly, the decision of the Fifth Circuit Court of Appeals is not in conflict with this Court's decision in *Bisso v. Inland Waterways Corporation.*[17] In *Bisso,* the Court invalidated a towage contract providing that "the towing movement should be at the 'sole risk' " of the barge being towed.[18] The Court stated that historically, the two main reasons for invalidating exculpatory clauses had been (1) to discourage negligence by making wrongdoers pay damages, and (2) to protect those in need of goods or services from being overreached by others who have power to drive hard bargains. These reasons justified invalidating exculpatory clauses in towing contracts given the nature of the industry and the vessel owner's need to operate "free of monopolistic compulsions".[19]

---

17. 349 U.S. 85 (1955).

18. *Id.* at 86.

19. *Id. See also* Dixilyn Drilling Corp. v. Crescent Towing & Salvage Co., 372 U.S. 697 (1963), wherein this Court invalidated an indemnification agreement between a tug owner and a barge owner as being an exculpatory provision condemned by *Bisso.*

The Petitioner's assertion that the additional assured provision in the Master Service Contract is invalid under *Bisso,* however, rests on a fundamental misperception that an agreement respecting the procurement of insurance is by definition exculpatory. In the case at bar, the Fifth Circuit correctly held that the additional assured provision in the Master Service Contract was not invalid under *Bisso.*[20] The Fifth Circuit relied on its prior decision in *Twenty Grand Offshore, Inc. v. West India Carriers, Inc.,*[21] wherein the court of appeals rejected an argument that a co-insurance provision in a towing agreement was an indirect attempt to import into the agreement an exculpatory clause of the type invalidated by *Bisso.*

The *Twenty Grand Offshore* court clearly distinguished additional assured provisions from an indemnification clause, observing that nothing in the insurance agreement relieved the party for whom insurance was obtained from any liability resulting from its own negligence.[22] In articulating this distinction, the court of appeals correctly noted that the insurance provision resulted in a shifting of liability "neither by indirection nor otherwise."[23]

On this basis, the *Twenty Grand Offshore* court concluded that the insurance provision before it did not contravene the underlying policy of *Bisso* "to discourage negligence by making wrongdoers pay damages." For similar reasons, the second policy consideration of *Bisso* "to protect those in need of goods or services from being

---

20. Voisin v. O.D.E.C.O. Drilling Co., 744 F.2d 1174, 1178-79 (5th Cir. 1984).

21. 492 F.2d 679 (5th Cir.), *cert. denied,* 419 U.S. 836 (1974).

22. *Id.* at 683.

23. *Id.*

overreached by others" is inapplicable in the factual context of the case at bar. Clearly, the mere existence of the additional assured provisions in the Master Service Contract without more evidences no overreaching.[24] Nor, as was found by the Fifth Circuit in the instant case,[25] is there any other evidence in the record to support such a conclusion.

The analysis of the *Twenty Grand Offshore* court is consistent with other decisions of the Fifth Circuit Court of Appeals,[26] as well as decisions in other circuits,[27] which have repeatedly emphasized that contractual insurance provisions such as the provision in the case at bar are not exculpatory clauses of the type invalidated by *Bisso.* Indeed, the courts of appeals consistently have upheld contractual insurance provisions against assertions of invalidity under *Bisso v. Inland Waterways Corporation.* Accordingly, the decision of the Fifth Circuit Court of Appeals below is not in conflict with the Supreme Court's decision in *Bisso.*

---

24. *Id.* at 683-85; Fluor Western, Inc. v. G & H Offshore Towing Co., 447 F.2d 35, 39 (5th Cir.), *cert. denied,* 405 U.S. 922 (1972). Nor is lack of mutuality with respect to the insurance obligations of the parties any evidence of overreaching. BASF Wyandotte Corp. v. Tug Leander, Jr., 590 F.2d 96 (5th Cir. 1979).

25. Voisin v. O.D.E.C.O. Drilling Co., 744 F.2d at 1179.

26. Hercules, Inc. v. Stevens Shipping Co., Inc., 698 F.2d 726 (5th Cir. 1983) (en banc); Fluor Western, Inc. v. G & H Offshore Towing Co., 447 F.2d 35 (5th Cir.), *cert. denied,* 405 U.S. 922 (1972); Hartford Fire Ins. Co. v. Port Everglades Towing Co., Ltd., 454 F.2d 276 (5th Cir. 1972). *Accord,* Dillingham Tug & Barge Corp. v. Collier Carbon & Chemical Corp., 707 F.2d 1086 (9th Cir. 1983).

27. *E.g.,* Dillingham Tug & Barge Corp. v. Collier Carbon & Chemical Corp., 707 F.2d 1086, 1089 (9th Cir. 1983).

B. The Decision Of The Fifth Circuit Is Not Contrary To Decisions Rendered By Other Circuit Courts.

The Fifth Circuit's decision is fully supported by and consistent with the Ninth Circuit Court of Appeals' decision in *Price v. Zim Israel Navigation Co., Ltd.*,[28] which is the only additional circuit court decision addressing the central issue presented in the case at bar.

In *Price*, the Ninth Circuit upheld the validity of an additional assured provision in a contract between a vessel owner and a stevedore in the face of an argument that the provision was nullified by the statutory proscription of employer liability in Section 905(b). After careful consideration of the 1972 Amendments to the Act and the legislative history thereto, the *Price* court found no evidence of congressional intent to prohibit the insurance procurement provision before it.[29] The Ninth Circuit concluded that an additional assured provision does not make an employer directly or indirectly liable to the vessel, but merely allocates the responsibility for procuring insurance between the employer and the vessel owner.[30]

The holding of the Fifth Circuit below is premised on the same considerations, and is fully supported by and consistent with the decision of the Ninth Circuit Court of Appeals in *Price*.[31] The Petitioner suggests that the instant case can be factually distinguished from *Price* and that a "conflict" between the circuits therefore exists.

---

28. 616 F.2d 422 (9th Cir. 1980).

29. *Id.* at 429. *See also* Bloomer v. Liberty Mutual Ins. Co., 445 U.S. 81, 84-85 (1980).

30. 616 F.2d at 429.

31. *See* Voisin v. O.D.E.C.O. Drilling Co., 744 F.2d at 1177, 1178.

However, this argument is not persuasive. While the Petitioner correctly notes that *Price* involved an action by a vessel owner against the insurer of a stevedore that, pursuant to contract, had procured liability insurance naming the vessel owner as an additional assured, the argument advanced by the insurer in *Price* and rejected by the Ninth Circuit Court of Appeals is precisely that which has been urged by the Petitioner. The instant case is distinguishable from *Price* only because the Petitioner, unlike the employer in *Price,* breached a contractual obligation to procure insurance naming Respondent as an additional assured.[32] The *Price* court upheld such an agreement in the face of an argument that it violated the statutory proscription of employer liability under Section 905(b) of the Act, and the holding in *Price* fully supports the imposition of liability upon the Petitioner for breach of contract in the case at bar.

Contrary to the assertions of the Petitioner, the Fifth Circuit's decision does not contravene the proscription against employer liability contained in Section 905(b) of the Act. The insurance provisions of the Master Service Contract do not by indirection or otherwise cast liability upon the Petitioner for personal injuries of employees such as the Plaintiff. Rather, the Petitioner's liability is a direct and proximate result of its breach of the Master Service Contract by failing to obtain the appropri-

---

32. Petitioner correctly notes that the Fifth Circuit has equated the employer's compensation insurer with the employer for purposes of the Longshoremen's & Harbor Workers' Compensation Act. *See* Nation v. Morris, 483 F.2d 577, 589 (5th Cir. 1973); Johnson v. American Mutual Liability Ins. Co., 559 F.2d 382, 388 (5th Cir. 1977). Refer to Petitioner's Petition for Writ of Certiorari at pp. 8-9. The decisions, however, merely underscore the lack of any material distinction between *Price* and the Fifth Circuit's decision in this case.

ate insurance, and not a liability arising in an indemnity context.[33] It is clear from the record, and the Fifth Circuit correctly held,[34] that the Petitioner's breach of contract necessarily caused the Respondent to pay monies it would not otherwise have owed in connection with the Plaintiff's claim, and well settled principles of contract law support the Respondent's entitlement to recover from Petitioner its damages resulting from Petitioner's breach of contract.[35]

CONCLUSION

The necessary elements for writ of certiorari are completely absent in this case. The Fifth Circuit's decision in the instant case is not in conflict with any decision of this Court construing the 1972 Amendments to the Act and the legislative history thereto. Further, the holding of the Fifth Circuit below is not in conflict with the Court's decision in *Bisso v. Inland Waterways Corporation.* Nor is the decision of the Fifth Circuit contrary to decisions rendered by other circuit courts. Rather, the Fifth Circuit's decision is fully supported by and consistent with the decision of the Ninth Circuit Court of Appeals in *Price v. Zim Israel Navigation Co., Ltd.,* which is the only decision of another federal court of appeals on point.

In sum, the additional assured provision contained in Section 8(f) of the Master Service Contract contravenes neither the prudential considerations underlying *Bisso* nor the statutory proscription of employer liability in Section

---

33. *See* Stewart v. Cran-Vela Rental Co., 510 F.2d 982, 985 (5th Cir. 1975). *See also* Ogea v. Loffland Bros. Co., 622 F.2d 186 (5th Cir. 1980).

34. Voisin v. O.D.E.C.O. Drilling Co., 744 F.2d at 1179.

35. Stewart v. Cran-Vela Rental Co., 510 F.2d at 985-86.

905(b) of the Longshoremen's & Harbor Workers' Compensation Act. The provision merely allocates initially the burden of procuring insurance and does not by indirection or otherwise require the Petitioner to indemnify the Respondent with respect to any damages assessed against it in a third-party action under Section 905(b). Rather, the Petitioner's liability in the case at bar is a direct and proximate result of its breach of the Master Service Contract by failing to obtain the appropriate insurance, and not a liability arising in an indemnity context. No decision rendered by this Court or by any of the appellate courts can be or has been cited which demonstrates that the Fifth Circuit's ruling in this case was improper. Accordingly, the Petition for Writ of Certiorari filed herein should be denied.

Respectfully submitted,

JAMES PATRICK COONEY

WILLIAM R. TOWNS

Attorneys for Respondent,
Odeco Drilling, Inc.

Of Counsel:

ROYSTON, RAYZOR, VICKERY & WILLIAMS
2200 Texas Commerce Tower
Houston, Texas 77002
713/224-8380

CERTIFICATE OF SERVICE

I hereby certify that I have served three copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari upon L. Keith Slade, 8 Greenway Plaza, 1200 Cashco Tower, Houston, Texas 77046, the attorney for Petitioner herein, by placing the same in the United States Certified Mail, Return Receipt Requested, in a properly addressed package with adequate postage thereon, on this the 25th day of February, 1985.

OF ROYSTON, RAYZOR, VICKERY
& WILLIAMS